In the

Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-752

T. L. BAKER,

Petitioner,

v.

LINNIE CARL MCCOLLAN,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

REPLY BRIEF FOR PETITIONER

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INTRODUCTION AND SUMMARY OF ARGUMENT

The facts giving rise to this case are generally uncontroverted and shall not be restated. The statements of the case by all parties are basically in accord, the differences being the characterization of facts rather than the events or sequence of events giving rise to this action.

The primary thesis of arguments by both Respondent and *Amici* is that the stated cause of action is one for an intentional deprivation of rights and the court should not reach the question of whether negligence can state a § 1983 action. Neither party responds to Petitioner's position that no

§ 1983 action was shown because of a failure to show a deprivation of a recognized Federal right.

Respondent and *Amici* argue that a prima facie § 1983 action for false imprisonment is demonstrated merely by showing an erroneous confinement. The required deprivation to be shown, however, under existing authority, the fourteenth amendment or even general common law is "a confinement without legal authority." This fact was not shown herein and cannot be presumed because there was a valid warrant for arrest which described Respondent. While it may be proper to presume "intent to arrest without legal authority" when no process exists, it is illogical to presume such intent when the confinement is unquestionably supported by valid process.

The most culpable conduct the evidence will support is an unintentional and possibly negligent failure to act. Such conduct, however, should not be the foundation of a § 1983 action. It is unlikely that Congress intended § 1983 to apply to negligent or unintentional acts when the debates preceeding the Act clearly indicated Congress was concerned with overt acts or failures to act accompanied with deliberate intent to cause an injury. Furthermore, the adoption of a negligence standard would encourage litigation but do little to deter undesirable conduct.

The arguments throughout the briefs of Respondent and *Amici* which rely upon state law as a standard for applying § 1983 should likewise be rejected. Respondent brought no pendent state claim and, the Congressional debates accompanying the predecessor statute to § 1983, clearly indicated Congress' purpose was to guarantee to all citizens Constitutional rights. The Act was passed to avoid the effect of state actions, not to enforce them.

I.

Neither Respondent nor the Amici Curiae have demonstated any intentional deprivation of a recognized federal right.

The initial thrust of arguments by both Respondent and *Amici Curiae* is that this case does not raise the issue of whether mere negligence can state a cause of action under § 1983.[1] Petitioner agrees that the court need not reach such issue but for a totally different reason than that asserted by Respondent and *Amici*. The issue need not be reached because there is no evidence that Petitioner Baker, intentionally or negligently, deprived Respondent of a *recognized federal right*.[2]

Both Respondent and *Amici* assume that the slightest interference with a man's freedom states a Constitutional deprivation of rights. The fourteenth amendment, however, does not so provide. Rather, it restrains the deprivation of

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[1] Brief of Respondent, Points I and II, 8-17; Brief of *Amici Curiae*, Points I and II, 11-34. Respondent even takes the strange position that negligence was somehow inserted into the case by Petitioner, (footnote 1 of Brief of Respondent, at 9) though Petitioner has consistently asserted that negligence does not state a § 1983 action.

[2] The supposed actionable conduct was the failure to have used a particular method of identification. The right to be identified only in a particular manner has never before been a recognized federal right and should not support a § 1983 action. *Procunier v. Navarette*, 434 U.S. 555 (1978).

liberty "without due process of law."[3] Nowhere does either Respondent or *Amici* respond to Petitioner's assertion that no violation of due process occurred.

Respondent asserted his claim under 42 U.S.C. § 1983 and the fourteenth amendment to the Constitution.[4] Thus one must assume that Respondent intended to show a deprivation of due process. Respondent's pleadings also support this contention in that Respondent alleged that he was ". . . incarcerated without probable cause and without the authority of a warrant authorizing the arrest. . . ."[5] Neither Respondent or *Amici* develop this point, of course, because the evidence produced at trial dispelled any doubt that the arrest and confinement was effected in reliance upon a valid warrant.[6]

Nor can Respondent and *Amici* cure their dilemma by improperly characterizing the case as an intentional false imprisonment cause cognizable under § 1983 when the confinement is unsupported by any process. Relying primarily on *Bryan v. Jones*[7] and *Whirl v. Kern*,[8] both argue that a *prima facie* case is stated so long as Respondent was, in fact, erroneously confined. Yet, in those cases the deprivation was

[3] U. S. Const. amend. XIV, § 1.

[4] Second Amended Complaint, Appendix (hereinafter "A") 6.

[5] *Id.*

[6] The warrant contained the name Respondent used in this appeal. Plaintiff's Exhibit 7, A 6. The validity or legal correctness of the warrant was never questioned.

[7] 530 F.2d 1210 (5th Cir. 1976) *(en banc), cert. denied,* 429 U.S. 865 (1976).

[8] 407 F.2d 781 (5th Cir. 1969).

the imprisoning "without any legal authority".[9] In both cases the authority for holding the prisoners had been terminated. The authority supporting the arrest and confinement in the instant case was never terminated.

The court in *Whirl v. Kern*[10] carefully distinguished the situation presented in the instant case from the false imprisonment therein. The *Whirl* court said:

> "The case at bar is not, as appellees would have us view it, a case of justifiable reliance upon a warrant of committment valid on its face. Cf. Francis v. Lyman, supra; Peterson v. Lutz, supra. The sheriff relied on nothing and his actions were not informed actions."[11]

In the instant case, the Sheriff and his deputies had relied upon a warrant valid on its face in arresting and holding Respondent. Unlike *Whirl v. Kern*[12] and *Bryan v. Jones*,[13] the warrant was not terminated nor is there any evidence of its invalidity.[14]

Petitioner does not mean to suggest that a police officer may blindly rely upon any warrant regardless of whether

[9] In *Whirl v. Kern*, 407 F.2d 781 (5th Cir. 1969) the prisoner was held without any process for over nine months and in *Bryan v. Jones*, 530 F.2d 1210 (5th Cir. 1976) the prisoner was held for more than a month without process.

[10] 407 F.2d 781 (5th Cir. 1969).

[11] *Id.* at 791.

[12] 407 F.2d 781 (5th Cir. 1969).

[13] 530 F.2d 1210 (5th Cir. 1976) *(en banc), cert denied,* 429 U.S. 865 (1976).

[14] Under these circumstances the arrest is normally held to have been executed in accordance with due process. *Perry V. Jones,* 506 F.2d 778 (5th Cir. 1975); *Francis v. Lyman,* 216 F.2d 583 (1st Cir. 1954).

it describes the person to be arrested or not. Where, however, the warrant does describe the person to be arrested and he was clearly identified as the person named in the warrant, something more must be shown to suggest a violation of due process.[15] Merely showing that the person should not have been arrested and confined should not be the test if one is to continue the legal fiction that false arrest is an intentional tort.[16] When an officer arrests or confines without the aid of any process, it may be fair to presume that he intended *to arrest or confine without process.*[17] When, however, one arrests and confines pursuant to process, it cannot logically be presumed that he intended *to arrest or confine without process.*[18]

Excepting the "intent" weaved from Respondent's and *Amici's* concocted legal fiction, the record is devoid of any evidence of intentional conduct by Petitioner which deprived

[15] Proof that one knew the process was inaccurate, knew that respondent was not the person sought, or knew facts demonstrating such conclusions and deliberately ignored such facts would appear to be the required minimal proof to characterize the conduct herein as an intentional "arrest without process."

[16] Actual intent, a subjective state of mind, must often be proven circumstantially. Courts have assisted in the proof by creating the legal presumption or sanctioned "legal fiction" that a person "intends" the natural and probable consequences of his actions. See *Monroe v. Pape,* 365 U.S. 167, 187 (1951). This presumption is necessary to uniformly conclude that "false imprisonment" is an intentional tort. To further conclude that an intentional violation of due process was involved, the objective facts should support the conclusion *i.e.* arrest without process.

[17] *Bryan v. Jones,* 530 F.2d 1210 (5th Cir. 1976) *(en banc), cert. denied,* 429 U.S. 865 (1976); *Whirl v. Kern,* 407 F.2d 781 (5th Cir. 1969).

[18] *See Atkins v. Lanning,* 556 F.2d 485 (10th Cir. 1977); *Perry v. Jones,* 506 F.2d 778 (5th Cir. 1975).

Respondent of any federal right. Respondent nevertheless argues that his claim is supported by Sheriff Baker's ". . . intentional failure to investigate and determine that the wrong man was in prison."[19] The error in analysis is the same. Intent is presumed, but not proved. The record is uncontroverted. The only knowing and intentional act Sheriff Baker is shown to have done was to investigate and release Respondent.

The attempts of the *Amici* to construct an intentional deprivation are equally unsupported by the record. *Amici* argue that the Sheriff had a duty to supervise his deputies and that, a failure to adequately supervise his deputies can result in § 1983 liability.[20] Merely stating that Sheriff Baker had a duty to supervise is not proof that Sheriff Baker intentionally or knowingly failed to perform a duty or to properly supervise his deputies. Even *Amici's* lightest standard for determining whether there was a failure to supervise is not shown by the evidence to have been breached. *Amici* state: "It is enough that he failed to intervene to stop or prevent a violation when he had a duty to do so."[21] Yet *Amici* do not suggest any evidence tending to demonstrate a deliberate or even negligent breach of that duty.

Amici argue that a Sheriff who fails to perform a statutory duty can be held liable under § 1983 for that failure.[22] Yet,

[19] Brief For Respondent, at 12.

[20] Brief of *Amici Curiae,* 14-33.

[21] *Id.* at 19.

[22] *Id.,* 20-23.

there is no statute requiring any specific method of identification in executing a warrant.[23] *Amici* then suggest that the duty to supervise can arise from actual knowledge,[24] but *Amici* can point to no evidence in the present case that gives the duty relevant application. Sheriff Baker personally acted to release Respondent the moment he had actual knowledge of his confinement and then acted to lessen the likelihood of a recurrence of the questioned conduct.

Finally, *Amici* suggest that the Sheriff may be held liable in a § 1983 case for failing to supervise his office and to establish procedures to foreclose a reasonably foreseeable occurrence.[25] It should be noted that while *Amici* protest that this is not a negligence case, they set up a classic negligence standard for holding the Sheriff liable.[25] While this negligence argument is closer to the facts of this case, it must nevertheless fail because it is not supported by the evidence

[23] *Amici* compare a California statute discussed in *Johnson v. Duffy*, 588 F.2d 740 (9th Cir. 1978) requiring specific action with a Texas statute setting out only the general duty to supervise. *Johnson v. Duffy* is also questionable as authority when compared with *Anderson v. Nosser*, 438 F.2d 183 (5th Cir. 1971) mod. and aff'd. 456 F.2d 835 (1972) *cert. denied* 409 U.S. 848 wherein the court held that failure to take before a magistrate did not state a § 1983 action though clearly and specifically required by state statute because it was not a duty encompassed by due process.

[24] Brief of *Amici Curiae*, 26-33.

[25] *Amici* would predicate liability on the "... failure to take elementary precautions that others in the same situation would take ... where his own failure proximately causes a foreseeable deprivation of a federally protected right." Brief of *Amici Curiae* at 27.

and the legal authority is misrepresented.[26] There was no evidence of the Sheriff's "... failure to take elementary precautions ..."[27] to prevent a foreseeable injury. There were identification procedures used to determine that Respondent was the man wanted by the warrant. Respondent was identified by driver's license, date of birth and description. Further, there were additional procedures which were put into effect that did cause the release of Respondent. That the procedures may not have worked as rapidly as other proposed procedures might have, does not demonstrate the affirmative and intentional lack of supervision needed to convert inaction into intentional nonfeasance. All the evidence demonstrated that the Sheriff was extremely attentive to his duties and acted immediately to correct any deficiencies noted.

[26] *Dewell v. Lawson*, 489 F.2d 877 (10th Cir. 1974) cited by *Amici* is not authoritative and the facts were misstated by *Amici*. There the court was reviewing a dismissal on the pleadings. The court could only review plaintiff's complaint and determine whether, under any facts plaintiff might conceivably prove, a cause of action could be maintained. Though the rationale of the decision seemingly based upon either simple negligence or strict liability in tort is questionable, the court did not suggest that mere evidence of a failure to have a particular procedure would support a cause of action. Presumably plaintiff therein could show that the Chief of Police knew of problems in handling medical care and did not act. *Amici* further distorts the case by creating the following facts not present in the opinion: "The Police Chief was unaware of the particular problem. He did not order the arrest, nor did he know of the search for the missing man." Brief of *Amici Curiae* at 27. Since these facts are not recited in the opinion one must wonder about their accuracy and the manner in which the court considered such unknown facts.

[27] Brief of *Amici Curiae* at 27.

In the instant case, the trial court directed an instructed verdict after hearing all of the evidence.[28] To urge that a fact issue is present herein to support an intentional deprivation, *Amici* should point to evidence demonstrating or tending to show a failure to institute policies to prevent a known or foreseeable injury. Minimally, this should require a showing that existing identification procedures had previously been ineffective.[29] This *Amici* cannot do. All that can be shown is that the Sheriff acted to correct a known problem once it existed. There is no evidence that the procedures in effect were inadequate for known or foreseeable injuries reached by § 1983.

II.

Something more than mere negligence should be required to support a § 1983 action.

The facts of this case amply demonstrate the far reaching effects of holding that any evidence of negligence will support a jury issue in a § 1983 case. Particularly this is true where, as here, the simple negligence is of the passive variety.[30] Nevertheless both Respondent and *Amici* argue for such a standard notwithstanding their position that Respondent did not bring an action based on negligence.

[28] Judgment of United States District Court for the Northern District of Texas, A 15.

[29] In *Rizzo v. Goode*, 423 U.S. 362 (1975) this Court considered relevant whether a "pattern" of misconduct had been demonstrated before moving to the question here presented of whether an "affirmative link" between the policy and misconduct existed.

[30] There was no evidence of prior errors in indentification nor any "pattern" of mistaken arrests or any other event occurring before the arrest and confinement to support an inference of intentional nonfeasance.

It is ironic that *Monroe v. Pape*[31] has become the authority for contending that simple negligence should support a § 1983 action. As developed in Petitioner's brief, no clearer facts could exist than those in *Monroe* demonstrating intentional conduct which violated a series of Constitutional rights.

More ironic still is the use of certain authority cited by the Court in *Monroe* and relied upon by *Amici* and Respondent herein to argue that no intent is necessary to support an action under § 1983. The Court in *Monroe* cited,[32] and *Amici* and Respondent in this case rely upon,[33] Congressman Arthur of Kentucky in determining the intent of Congress in passing § 1983. The irony in the reliance upon Mr. Arthur as a spokesman for the intent of the bill is that Mr. Arthur was vehemently opposed to the act.[34] Furthermore, this Court and other courts have rejected most of Mr. Arthur's statements concerning the "intended" effect of the bill. Expanding somewhat on the quote set forth in *Monroe v. Pape*,[35] to place same in proper context, we find that Mr. Arthur feared the bill would have unusually dramatic effects. Quoting before and after the portion noted by the court in *Monroe v. Pape*,[36] we find that Mr. Arthur said, concerning the bill before Congress:

[31] 365 U.S. 167 (1961).

[32] *Id.* at 174, n.10.

[33] Brief of *Amici Curiae* at 35, Brief For Respondent at 18.

[34] The Court correctly labeled Mr. Arthur's position. *Monroe v. Pape*, 365 U.S. 167, 174 (1961); *Amici* do not note his posture, Brief of *Amici Curiae* at 35; and Respondent includes Mr. Arthur as a supporter of the legislation, Brief for Respondent at 18.

[35] 365 U.S. 167 (1961).

[36] *Id.*

"It overrides the reserved powers of the States. It reaches out and draws within the despotic circle of central power all the domestic, internal, and local institutions and offices of the States, and then asserts over them an arbitrary and paramount control as of the rights, privileges, and immunities secured and protected, in a peculiar sense, by the United States in the citizens thereof. Having done this, having swallowed up the States and their institutions, tribunals, and functions, it leaves them the shadow of what they once were. They are nominally what they should be as of sovereign right. And so long as they remain servile, suppliant, and subservient, the mailed hand of central power is stayed. But if the Legislature enacts a law, if the Governor enforces it, if the judge upon the bench renders a judgment, *if the Sheriff levy an execution, execute a writ, serve a summons, or make an arrest, all acting under a solemn, official oath, though as pure in duty as a saint and as immaculate as a seraph, for a mere error of judgment*, they are liable, and most certain, at the suit of any knave, plain or colored, under the pretext of the deprivation of his rights, privileges, and immunities as a citizen . . . of the United States, to be summarily stripped of official authority, dragged to the bar of a distant and unfriendly court, and there placed in the pillory of vexatious, expensive, and protracted litigation, and heavy damages and amercements, destructive of health and exhaustive of means, for the benefit of unscrupulous adventurers or venal minions of power."[37] [Emphasis added to show portion quoted in *Monroe v. Pape*.]

If Mr. Arthur is correct in stating the intent of Congress, the Court should not excuse the legislatures that enact laws or the Governor that enforces it or the Judges that render judgments. Is not the legislature of Texas equally at fault

[37] Cong. Globe, 42nd Cong., 1st Sess. at 365.

with the Sheriff for failing to have foreseen this problem and enacted a statute requiring sheriffs to use specified means of identification when executing warrants? Is not the Governor at fault for failing to suggest such a bill? Should Judges be protected by virtual absolute immunity in light of Mr. Arthur's suggestions of Congressional intent?

The debate in Congress concerning the passage of the bill that became § 1983 was lengthy. Perhaps other isolated statements may be found superficially suggesting that Congress intended unintentional conduct to be the basis of a § 1983 suit. Yet, even a cursory review of the Congressional debates will clearly indicate that the men deliberating the passage of this statute were not contemplating the type of action set forth in the instant case. Rather, they were concerned with reports indicating a virtual breakdown of law and order,[38] with crimes by whites against blacks going unpunished,[39] with arrests and detentions of blacks totally

[38] This was the tenor of the message of President Grant to Congress initiating the efforts to pass the civil rights legislation. The message was read into the Congressional Record by Hon. J. R. McCormick of Indiana, Cong. Globe, 42nd Cong., 1st Sess. App. 135.

[39] Representative J.P.C. Shanks of Indiana, a strong proponent of the Act, expressed his concern, in part, as follows:

"The men who once formed the slave power of this country, and who now compose the southern wing of Democratic Party, as they did before the war, and who have so longed controlled the destinies of American Democracy, making the exact opposite of that which its name indicates, and who are the power behind the throne and those southern outrages, are to the Negro as a retreating army that destroys all its property that it cannot take with it to keep from falling into the hands of the enemy. So these men; they were compelled to retreat from the army of liberty, and they now purpose to destroy the Negro whom they cannot longer hold his property, rather than he shall become a political strength with those who set him free." Cong. Globe, 42nd Cong., 1st Sess., App. 142.

devoid of any due process.[40] That these men thought the deprivations with which they were concerned were unintentional or negligent somewhat stretches credulity. Rather, it appears that they were dealing with intentional acts and refusals to act which would be characterized as wanton, deliberate, intentional, possibly as deliberately indifferent or grossly negligent, but certainly not as unintentional or negligent.

The conclusion of *Amici* that Congress "intended to permit . . . liability and damages for negligent conduct is suspect."[41] The support gained from *Monroe v. Pape*[42] and *Pierson v. Ray*[43] can take them no further than the conclusion that one need not have a specific intent to violate a Federal right. Neither opinion indicated that intentional or deliberate conduct causing the deprivation was unnecessary.[44]

[40] The record of debates contains listings of crimies going unpunished and punishments inflicted offered in support of the conclusion that the legal processes were being deliberately abused to inflict punishment upon blacks. See, *e.g.*, Portion of speeches of Congressman J.P.C. Shanks, Cong. Globe, 42nd Cong., 1st Sess., App. 144-149; Congressman W. Williams of Indiana, *Id.* at 165-167; and Senator A. I. Boreman of West Virginia, *Id.* at 224-227.

[41] Brief of *Amici Curiae* at 12.

[42] 365 U.S. 167 (1961).

[43] 386 U.S. 547 (1967).

[44] In *Monroe v. Pape*, 365 U.S. 167 (1961) the conduct was objectively a violation of due process. In *Pierson v. Ray*, 386 U.S. 547 (1967) the Court clearly held that plaintiff must prove an absence of "due process", in that case a lack of probable cause. On remand, the plaintiff's burden was to show that the officers did not rely on the invalid statute but deliberately arrested and confined them for attempting to use the "white only" waiting room. *Id.* at 296. Corresponding proof here would be proof that Sheriff Baker arrested and confined Respondent for reasons other than his belief he was the man named in the warrant.

Amici's conclusion that adopting a negligence standard poses no danger of flooding federal courts with nonessential litigation is also questionable.[45] Professor Friedman, one of counsel for *Amici*, has outlined the tremendous growth of civil rights cases.[46] It is highly probable that the adoption of a reduced standard would further accelerate this growth of litigation. In return, little benefit would be gained. As stated in *Bonner v Coughlin*,[47] "extending Section 1983 to cases of simple negligence would not deter future inadvertence as much as in the case of intentional or reckless conduct."[48]

III.

State standards should not determine federal rights.

One frame of reference from which Respondent and *Amici* address the issues posed by this case is erroneous. The prevailing Texas law pertaining to false imprisonment has no direct application because Respondent asserted no pendent state claim.[49] Indeed, counsel for Respondent expressly dis-

[45] Brief of *Amici Curiae* at 38.

[46] *See* Friedman, *The Good Faith Defense in Constitutional Litigation*, 5 Hofstra L. Rev. 501, 502 (1977) which discusses a 1,614% increase in such litigation between 1960 and 1970. Professor Friedman suggests at 502 the possibility of the increase flowing, in part, from the decision in *Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics*, 403 U.S. 388 (1971). A holding that unintentional conduct may give rise to § 1983 cases would seemingly have an even more widespread effect.

[47] 545 F.2d 565 (7th Cir. 1976) *(en banc)*.

[48] *Id.* at 568.

[49] Respondent's Second Amended Complaint contained an allegation of fact concerning Texas law but suggested jurisdiction only under Federal statutes. Second Amended Complaint, A 6.

avowed any intent to incorporate a pendent state claim in this action, apparently on the premise that the perceived scope of § 1983 rendered such election unnecessary.[50] Yet Respondent and *Amici* predicate the actionability of this case in large measure upon the statutorily defined supervisory duties of a Texas sheriff and the Texas false imprisonment cases, the tenor of which, as developed *infra*, is misrepresented.

As noted above, the facts of this case fail to state a § 1983 cause of action because there is no recognized Constitutional "right" that an arrest and confinement be the result of identfication procedures which are demonstrably the most efficient.[51] Thus even if a state claim *had* been asserted, such could not have been entertained by the court below in the absence of a colorable § 1983 claim.[52]

The foregoing notwithstanding, it is also clear that current precepts of Texas false imprisonment law, measured against the facts of this case, will avail Respondent nothing. Liability must be founded upon a showing that a sheriff

[50] In a colloquy between the trial court and counsel for Respondent, it was made clear that no pendent claim was brought because counsel believed § 1983 to encompass any state tort relating to imprisonment as well as one violating federal due process. See Reporter's Transcript of Proceedings, 228-229.

[51] The court below premised a fact issue on the failure to use particular identification procedures rather than whether it was unreasonable to have identified Respondent as the person named in the warrant, Opinion below, A 21. The distinction may be subtle but is supported by the Restatement of Torts § 125(a). The privilege granted by the warrant is based upon the reasonable belief of the actor that the person arrested is the person named and not the method used to form the belief.

[52] *Coe v. Bogart*, 519 F.2d 10 (6th Cir. 1975); *Manchester v. Lewis*, 507 F.2d 289 (6th Cir. 1974).

knew or should have known that an incarceration was without legal authority and did nothing.[53] Accordingly, the reliance of *Amici* and *Respondent* upon Texas law is misplaced.

In *Whirl v. Kern*,[54] the court clearly discussed and relied upon the Texas cases because it did not have a pendent state claim before it. As discussed *supra*, the false imprisonment there existed because the imprisonment was based upon no authority whatever. Here one cannot presume that the officers "intended to confine without a warrant" because they clearly "intended to confine pursuant to a warrant." Under Texas law no action could arise until the Sheriff was in a position to act and failed to act.[55]

Amici and Respondent advance a second questionable thesis regarding state law: that liability under § 1983 is necessarily coterminus with state common law and statutory actions indirectly involvng an asserted federal right.[56] This hypothesis is not supported by the intent of Congress, as derived from the Congressional record; nor does the proffered posture fall within the pale of sound public policy. The construction of § 1983 urged by *Amici* and Respondent would make that statute the font of tort law rejected in *Paul v. Davis*[57] where this Court said:

[53] *Workman v. Freeman*, 289 S.W.2d 910 (Tex. 1966); *McBeath v. Campbell*, 12 S.W.2d 118 (Tex. Comm'n App. 1921, holding approved).

[54] 407 F.2d 781 (5th Cir. 19[illegible]) *cert. denied*, 396 U.S. 901 (1969).

[55] *Id.*

[56] Brief of *Amici Curiae*, Point II, 14-33; Brief For Respondent at 14.

[57] 424 U.S. 693 (1976).

> "Respondent . . . has pointed to no specific Constitutional guarantee safeguarding the interest he asserts has been invaded. Rather, he apparently believes that the Fourteenth Amendment's Due Process Clause should ex proprio vigore extend to him a right to be free of injury wherever the State may be characterized as the tort feasor. But such a reading would make of the Fourteenth Amendment a font of tort law to be superimposed upon whatever systems may already be administered by the States."[58]

A showing of a deprivation of right in this case should necessarily be predicated upon a lack of "due process" in connection with Respondent's arrest and confinement. Since a warrant for arrest which described Respondent did exist, something more must be shown to indicate a violation of due process. Respondent and *Amici* argue that mere negligence in the handling of administrative procedures which delayed the discovery of the error in arresting Respondent is sufficient to destroy the privilege provided by a valid warrant in the name of Respondent. Such argument rests, in part, upon Respondent's and *Amici's* position that State law holds the Sheriff to such a standard of care.[59]

Notwithstanding the clear intent of Congress to establish and preserve basic Constitutional rights to all citizens, Respondent and *Amici* now suggest that the Federal rights should vary in accordance with state law. They assert that it is fair to hold the Sheriff in Texas to a higher standard than elsewhere simply because the State does so. Yet, if Constitutional due process is to have any meaning whatsoever, it must mean the same thing throughout the nation. The largest portion of Congressional debates centered around the question of whether Congress had any power to override State procedural statutes. Concluding that it did, it passed the Civil Rights legislation with which we are now concerned. If the states may not take away Federal rights it seems that they should not each be able to define them according to the common law peculiar to the particular state.

[58] *Id.* at 701.

[59] *Amici* and Respondent look to state law for the duty which is supposedly breached and to avoid the impact of this Court's rejection of the doctrine of respondeat superior in *Monell v. New York Department of Social Services*, 436 U.S. 658 (1978).

CONCLUSION

For the reasons set forth above and in the Brief For Petitioner filed herein, the decision of the court of appeals should be reversed, affirming the directed verdict granted Petitioner by the district court.

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